

**MISSOURI COURT OF APPEALS  
WESTERN DISTRICT**

**LINCOLN SMITH, ET AL.,  
APPELLANT-RESPONDENT  
vs.**

**BROWN & WILLIAMSON TOBACCO CORPORATION,  
RESPONDENT-APPELLANT**

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DOCKET NUMBER WD71918 (Consolidated with WD71919)

DATE: OCTOBER 2, 2012

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Appeal from:

The Circuit Court of Jackson County, Missouri  
The Honorable Marco A. Roldan, Judge

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Appellate Judges:

Court En Banc: James E. Welsh, C.J., James M. Smart, Jr., Joseph M. Ellis, Victor C. Howard, Thomas H. Newton, Alok Ahuja, Mark D. Pfeiffer, Karen King Mitchell, Cynthia L. Martin, Gary D. Witt, JJ. and Jacqueline Cook, Sp. J.

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Attorneys:

Kenneth B. McClain, II, for Appellant-Respondent

Jeffrey Buckholtz, for Respondent-Appellant

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## **MISSOURI APPELLATE COURT OPINION SUMMARY**

### **MISSOURI COURT OF APPEALS WESTERN DISTRICT**

**LINCOLN SMITH, ET AL., APPELLANT-RESPONDENT**

**v.**

**BROWN & WILLIAMSON TOBACCO CORPORATION, RESPONDENT-APPELLANT**

WD71918

Jackson County, Missouri

Before Court En Banc: James E. Welsh, C.J., James M. Smart, Jr., Joseph M. Ellis, Victor C. Howard, Thomas H. Newton, Alok Ahuja, Mark D. Pfeiffer, Karen King Mitchell, Cynthia L. Martin, Gary D. Witt, JJ. and Jacqueline Cook, Sp. J.

The survivors of Barbara Smith ("the Smiths") appeal from a judgment, entered following remand from this Court for retrial solely on the issue of punitive damages, finding Brown & Williamson Tobacco Corporation (B&W) liable for punitive damages and awarding the Smiths \$1,500,000. B&W cross-appeals contending that the Smiths failed to make a submissible case for punitive damages.

In the first phase of re-trial, the jury found B&W liable for punitive damages on the Smiths' strict liability product defect claim. During the second phase, B&W presented evidence that any punitive damages award would actually be paid by R.J. Reynolds Tobacco Company, which had acquired the right to manufacture the brand of cigarettes that Ms. Smith had used, and argued that R.J. Reynolds did not deserve to be punished with punitive damages.

### **REVERSED AND REMANDED.**

#### **Court En Banc holds:**

- (1) The trial court did not err in denying B&W's motion for JNOV as the evidence, which was almost identical to that presented in the first trial, was again sufficient to support a punitive damages award on the strict liability product defect claim.
- (2) B&W's claim that JNOV should have been granted because its strict liability product defect claim was preempted by federal law is barred by the law of the case doctrine.
- (3) The trial court exceeded the scope of this court's prior mandate in allowing B&W to argue that any punitive damages award would be paid by R.J. Reynolds and using evidence of R.J. Reynolds' historical corporate citizenship in order to mitigate B&W's punitive damages. Section 510.263.3 clearly and unambiguously mandates complete identity

between the defendant in the first phase of trial and the defendant in the second phase. In remanding the case for retrial of the issue of punitive damages, this Court clearly contemplated that the identity of the defendant in the first and second phases of trial would again be B&W, the party found liable for strict liability product defect in the affirmed portion of the first trial. Our mandate required that the jury on remand determine if punitive damages should be awarded **against B&W** on the strict liability product defect claim and to then determine how much, if any, punitive damages to assess **against B&W** related to that claim. By allowing the evidence and argument related to R.J. Reynolds to be used as a defense in the second trial, the trial court allowed B&W to effectively substitute defendants and to argue that non-party R.J. Reynolds should not have to pay punitive damages. Such evidence and argument were clearly beyond this Court's mandate and inconsistent with § 510.263.3.

Opinion by Joseph M. Ellis, Judge

Date: October 2, 2012

#### **JUDGE AHUJA'S DISSENTING OPINION WOULD HOLD:**

The mandate in *Smith I* specified that the re-trial: (1) would address only punitive damages, (2) would be limited to only the Smiths' strict liability product defect claim, and (3) would be prosecuted only against defendant Brown & Williamson ("B&W"). Each of those dictates of the mandate was followed: the only type of relief considered by the jury was punitive damages; the only claim submitted to the jury was the strict liability claim; and the only defendant against whom the jury assessed punitive damages was B&W. *Smith I* did not address – expressly or by implication – the scope of the evidence that would be admissible on remand in determining the amount of punitive damages to be imposed against B&W in the second stage of trial. Although B&W may have defended itself by presenting evidence of R.J. Reynolds's conduct to mitigate B&W's punitive damages exposure, that did not result in R.J. Reynolds being "effectively substitute[d]" as the defendant as the majority contends. While evidence concerning R.J. Reynolds' conduct might be of questionable relevance, the Smiths have made clear on appeal that they raise no relevance issue independent of their claim that admission of the R.J. Reynolds evidence exceeded the scope of the mandate. For the foregoing reasons, Judge Ahuja would affirm the trial court's judgment.

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